APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No. 3303

MEMORANDUM OPINION AND ORDER

This cause came on to be considered upon motions of the defendants to dismiss or in the alternative for summary judgment. The plaintiffs are a non-profit corporation, Protestants and Other Americans United for Separation of Church and State, aka Americans United, and twenty-two named individuals some of whom are citizens of the State of Ohio and some of them are citizens of other states. The named defendants are Harold Howe, II as Commissioner of Education of the United States of America; John D. Herbert as Treasurer, State of Ohio; R. A. Horn, as Ohio Director, Division of Federal Assistance; Jack E. Brown as Ohio-Coordinator Title II, Ohio Department of Education; Robert B. French as Superintendent, Dayton City School District, Dayton, Ohio; John W. Gardner as Secretary of Department of Health Education and Welfare of the United States.

In this suit, plaintiffs seek the following relief:

(1) A determination that Title II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 20 U. S. C. Sections 821-827 (hereinafter sometimes referred to as the Act) is unconstitutional;

(2) An injunction against the enforcement of the Act;

(3) The return of $14,606.02 by the Treasurer of the State of Ohio and the Superintendent of the Dayton City School District to the United States Treasury. (This amount is the sum which plaintiffs allege was distributed to twenty-two parochial schools in the Dayton City School District for the purchase of books and materials) and

(4) Damages on behalf of the individual plaintiffs, except Americans United, in the sum of $5,000,000.00.

Plaintiffs further seek the convening of a three judge court pursuant to Sections 2281 and 2284 of Title 28 U.S.C.

On March 20, 1967 this Court entered an order dismissing this action on the basis of the decision of the Supreme Court in *Frothingham v. Mellon,* 262 U. S. 447 (1923) in which the Supreme Court held that taxpayers lack standing to challenge the expenditure of federal funds in an unconstitutional manner. While an appeal of this Court's order was pending before the Court of Appeals for the Sixth Circuit the Supreme Court in the case of *Flast v. Cohen,* 392 U.S. 83 (1968) reconsidered its previous holding in the *Frothingham* case and held that individual taxpayers had standing to challenge payments under the Elementary and Secondary Education Act of 1965. On September 27, 1968 the United States Court of Appeals for the Sixth Circuit granted a joint motion to reverse and remanded this case for further consideration in the light of *Flast v. Cohen, supra.*

In the present case there is no genuine issue of material fact. Defendants' motions raised the following questions of law: First, whether the corporate entity, Protestants and Other Americans United for Separation of Church and State, has standing to sue. Second, whether the Elementary and Secondary Education Act of 1965 is violative of the establishment and free exercise clauses of the First Amendment of the United States Constitution.

With regard to the standing of the corporate entity, Americans United, this Court in its previous order held:

> "The amended complaint alleges no legal right of the organizational plaintiff, Protestants and Other Americans United for Separation of Church and State, which has been violated or threatened by defendants; therefore, it clearly has no standing to maintain this suit."

The decision of the Supreme Court in *Flast v. Cohen, supra,* does not affect this holding because the *Flast* decision only determined that individual taxpayers who alleged that tax money is being spent in violation of a specific constitutional protection against abuse of legislative power such as the establishment clause of the First Amendment have standing to sue. The decision is not controlling of the question of whether an organizational plaintiff has standing to sue. The organization, Americans United, has no standing to litigate the alleged violation of the rights of third persons. *Tileston v. Ullman,* 318 U.S. 44 (1943). The individual taxpayers are the only proper party plaintiffs to this action.

The question of whether the Elementary and Secondary Education Act of 1965 is unconstitutional because it violates the establishment and free exercise clauses of the First Amendment is controlled by a recent decision of the Supreme Court in *Board of Education v.*

Allen, 392 U.S. 236 (1968) in which New York's Educational Law requiring local public school authorities to lend textbooks free of charge to all students in grade seven to twelve, including those in parochial schools was declared constitutionally valid. In the *Allen* case the Supreme Court held that the New York Law fulfilled a secular legislative purpose in furthering the educational opportunities available to the young and did not advance or inhibit religion.

In *Board of Education v. Allen, supra*, at page 243-244 the Supreme Court stated:

> ". . . The express purpose of Section 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools . . ."

The New York Statute involved in the *Allen* case provided that local school boards must lend textbooks to all students in grades seven to twelve, including those in parochial schools. The New York Statute further provided that each book loaned must be approved by the public school authorities. Under the statute only secular books could receive approval. The Act challenged by plaintiffs in the present case is substantially identical to the New York Statute which was held to be constitutional. Title II of the Elementary and Secondary Education Act of 1965 authorizes the Commissioner of Education to make grants to States, which comply with certain requirements, for the acquisition of school library

resources, textbooks and other printed and published instructional material for the use of children and teachers in public and private elementary and secondary schools. The Act challenged in the present case contains a provision similar to that of the New York Statute upheld in the *Allen* case, designed to assure that grants made pursuant to the Act are used only to furnish secular textbooks and that the benefits of the Act are received by school children and not by the private institutions. Section 205 of the Act, Section 825, Title 20 United States Code provides:

> "(a) Title to library resources, textbooks, and other printed and published instructional materials furnished pursuant to this subchapter and control and administration of their use, shall vest only in a public agency.
>
> "(b) The library resources, textbooks, and other printed and published instructional materials made available pursuant to this subchapter for use of children and teachers in any school in any State shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are used, in a public elementary or secondary school of that State."

These requirements of the Act vesting title and control over the books and materials in a public authority and limiting the books and materials made available to those which have been approved by State school authorities or to those which are used in public schools is designed to assure that only secular books are supplied. There is no provision in the Act authorizing the awarding of grants for the purchase of religious books. Furthermore, plaintiffs do not allege that the program initiated under the Act is being used to furnish religious textbooks or that other materials supplied under the Act are being used in religious instructions. In *Board of Education v. Allen, supra,* the Supreme Court in considering similar

restrictions imposed under the New York Education Law stated at page 244-245:

> ". . . However, the language of §701 does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as 'merely making available secular textbooks at the request of the individual student,' supra, and the record contains no suggestion that religious books have been loaned. Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. . . ."

The primary effect of the Act is to promote a valid secular goal of enhancing the educational opportunities of the nation's youth. The Act takes great precautions in assuring that no direct benefit is received by private schools and that no religious books are supplied pursuant to the Act. The Court concludes that the Act does not violate the Establishment Clause of the First Amendment. Furthermore, the Act does not offend the Free Exercise Clause of the First Amendment because there is no allegation or showing that the Act coerces the plaintiffs as individuals in the practice of their religion. *Board of Education v. Allen, supra,* 248-249.

The plaintiffs have requested the convening of a three judge court. It is established law that a single judge who is presented with an application for an injunction restraining enforcement or execution of an Act of Congress has the authority, without convening a three judge court,

to determine whether the Court has jurisdiction and whether a substantial federal question is presented. *Lion Manufacturing Corp. v. Kennedy,* 330 F. 2d 833 (C.A.D.C. 1964); *Booker v. State of Tennessee Board of Education,* 240 F.2d 689 (C.A. 6 1957); *Bussie v. Long,* 254 F. Supp. 797 (D.C.E.D. La. 1966); *Bryant v. Federal Open Market Committee,* 235 F. Supp. 877 (D.C. Mont. 1964). In view of the holding of the Supreme Court in *Board of Education v. Allen, supra,* no substantial federal question is raised in the present case.

In accordance with the foregoing plaintiffs' request for a three judge court is not well taken and hereby is DENIED. Each defendants' motion for summary judgment is well taken and hereby is SUSTAINED. Plaintiffs' complaint is hereby DISMISSED.

/s/ CARL A. WEINMAN
Chief Judge U. S. District Court

APPENDIX B

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, et al.,
Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.
No. 20270.

United States Court of Appeals,
Sixth Circuit.
Dec. 16, 1970.

WEICK, *Circuit Judge.*

This appeal is from an order of the District Court granting summary judgment in favor of the defendants and dismissing the complaint, as amended.

The action in the District Court was brought under the Civil Rights Act (42 U.S.C. § 1983) to enjoin enforcement of Title II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 79 Stat. 36, 20 U.S.C. § 821-827, which authorizes federal grants for library and instructional materials for use of pupils and teachers in public and private (including parochial) schools.

Plaintiffs prayed that a three-judge court be convened, that an injunction be granted restraining enforcement of the Act, and sought a declaratory judgment that the statute is unconstitutional in violation of the Establishment Clause in the First Amendment to the Constitution of the United States; and further prayed for the return of $14,606.02 to the United States by the Treasurer of the State of Ohio and the Superintendent of the Dayton

School District, which sum was alleged to have been distributed to twenty-two parochial schools in the Dayton City School District for the purchase of books and materials; and further prayed for damages in the amount of $5,000.000.

[1] In a prior appeal, in an unreported order, we held that the plaintiffs had standing to sue on the authority of *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

The District Court, in a memorandum opinion and order, declined to convene a three-judge court and granted summary judgment in favor of the defendants on the ground that the issues of the case were controlled by the decision of the Supreme Court in *Board of Educ. of Central School Dist. No. 1 v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

[2] Where an injunction is sought to restrain the enforcement of a state or federal statute on the ground of violation of the Constitution of the United States, the District Court is required to convene a three-judge court under the provisions of either 28 U.S.C. § 2281 or § 2282, unless no substantial federal constitutional claim is presented or it is patently frivolous. *Bailey v. Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); *Turner v. Memphis,* 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762 (1962); *Ex Parte Poresky,* 290 U.S. 30, 31, 54 S.Ct. 3, 78 L.Ed. 152 (1933); *Jones v. Branigin,* 433 F.2d 576 (6th Cir. 1970).

The claim would be deemed unsubstantial if, as the District Court held, the Supreme Court had passed upon the precise question involved in the present case.

[3] The only question, therefore, for us to decide is whether the District Court was correct in ruling that the constitutionality of the Act was resolved in *Allen.*

In *Allen* the Supreme Court upheld a state statute which authorized the lending of secular text books to children irrespective of whether they attended public or private (parochial) schools. The Court applied the test stated in *School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause three must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222, 83 S.Ct. at 1571.

Allen followed *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), which upheld the constitutionality of a state statute providing for the free busing of school children to public as well as parochial schools.

In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection, sewage facilities, streets and sidewalks.

Title II of the Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools for use by the children and the teachers. While the statute contains safeguards intended to insure the purchase of secular books and materials only, there is still a question whether this constitutes forbidden involvements of the state with religion. It can be argued also that the loaning of libraries to sectarian schools frees the use of funds for religious purposes, that is, funds which otherwise would be used for library maintenance.

The District Court did not have the benefit of the recent decision of the Supreme Court in *Walz v. Tax Comm'n,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Court there held that state tax exemptions of properties used solely for religious purposes did not violate the Establishment Clause as it was not aimed at establishing or supporting religion, but simply spared the exercise of religion from the burden of property taxation levied on private profit institutions. The Court was of the view that the exemption created only a minimal and remote involvement between church and state, an involvement much less than the taxation of the churches would entail. The test is essentially one of degree.

In discussing the important subject of involvement, Chief Justice Burger, who wrote the opinion of the court, stated:

> "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that it is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation." 897 U.S. at 675, 90 S.Ct. at 414.

The decisions of the Supreme Court construing the Free Exercise and Establishment Clauses of the First Amendment have drawn fine distinctions and have laid down rules not easy to apply. They have been decisions by divided courts.

In our opinion, the additional step in the present case, namely, the loaning of library books and materials directly to the parochial schools, rather than the issuing of textbooks directly to the school children, together with the issue of whether the involvement required in applying the safeguards of the Act is minimal and remote, present substantial questions which were not resolved in *Allen*, and which require the convening of a three-judge District Court for determination.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings in conformity with this opinion.